No. 03-705

IN THE

Supreme Court of the United States

CITY OF LAS VEGAS, *et al.*,

Petitioners,

—v.—

AMERICAN CIVIL LIBERTIES UNION OF NEVADA, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

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STATEMENT OF THE CASE

In an attempt to restore its declining downtown hotel casino industry to its storied past, the City of Las Vegas followed the lead of towns across the United States and turned five blocks of its main downtown street into a publicly-owned pedestrian mall, the Fremont Street Mall. What was once known world-wide as "glitter gulch" because of the hotel casinos that rose up on both sides of Fremont Street with giant neon light displays was given an expensive make-over to compete with newer mega hotel casinos that have been built on Las Vegas Boulevard, known as the "Strip." To shield visitors from individuals distributing literature or soliciting membership or contributions, the City placed significant restrictions upon all First Amendment activities on the Fremont Street mall. Perversely, the ban on First Amendment activity gives the downtown casinos a competitive advantage over the casinos located on the Strip where similar attempts broadly to prohibit First Amendment activity have been repeatedly invalidated. After running afoul of the restriction upon First Amendment activities, the American Civil Liberties Union of Nevada ("ACLU") and others brought suit in an attempt to restore their First Amendment rights to where they were when Fremont Street was an undisputed public forum. App. 4a.

As described by the lower court, in the early 1990s, downtown Las Vegas was suffering from an economic downturn. The area was seen as sleazy and unsafe, and downtown casinos were unable to compete with the glitzy Las Vegas Strip. Moreover, key economic factors showed that the area was in decline. In an effort to halt the slump and return downtown to its former luster, city officials decided to emulate economic revival measures taken in cities throughout the United States by creating a pedestrian-friendly zone. Five blocks of Fremont Street, the center of the downtown area, were closed off to automotive traffic.

The City of Las Vegas contracted with a private entity, the Fremont Street Experience Limited Liability Corporation ("FSELLC"), to transform frumpy Fremont Street into the glamorous Fremont Street Experience. At a cost to the public and contributing Fremont Street businesses of $70 million, the street and sidewalk were torn up, various underground infrastructure elements were installed, the street was decoratively repaved as one large promenade, and a canopy capable of generating a lightshow (known, with a dash of hyperbole, as the "celestial superstructure") was installed over certain parts of the street. In the evening, the lightshow plays overhead for a few minutes each hour. App. 6a. Although Fremont Street itself is partially covered by the canopy, it remains open to the elements from above and all sides. App. 24a.

The street mall is also host to regular entertainment and promotional events designed to bring gamblers and business back downtown. These events, however, are not meant to compete with the City's primary objective of getting people back into the hotels and casinos that anchor the street mall. In this sense, the street mall is different from the downtown sports complexes or special events venues present in other recent public forum cases. The promotional and entertainment events that are staged are the type of street performances that are common in other outdoor pedestrian malls and tourist districts. The lower court identified a number of these other commercial venues from similar cases that arose in San Francisco, Los Angeles, and Venice Beach, California. App. 25a. The petitioners are clearly dissatisfied with the lower court's factual finding on this issue, but such factual disputes do not warrant review by this Court.

Despite its expensive makeover and the added attractions, Fremont Street's objective attributes as a major downtown street have not changed. The street mall is open to unrestricted pedestrian use and is part of the downtown transportation grid. Historic Fremont Street lies at the center

of the mall and is the main axis, intersecting five city blocks. All First Amendment activity is prohibited on Fremont Street itself and on the streets that intersect with it and those that anchor both ends. The perimeter streets and sidewalks are continuous with and adjacent to downtown's other streets and sidewalks. A visitor to this area would not walk around the mall to travel to the other side, but would walk through the mall either on Fremont Street itself or on one of the streets that intersect it. Although cars are no longer permitted to drive down the length of Fremont Street itself, the enabling legislation and the agreement between FSELLC and the City requires that a route for pedestrians remain open at all times, limiting FSELLC's discretion to manipulate the landscape or otherwise obstruct pedestrian use. Additionally, automotive traffic is permitted to cross the Fremont Street Mall in two places, and pedestrians cross at each intersection. App. 22a. The street is seamlessly incorporated into the City's downtown transportation grid and continues to anchor the central business and gaming district. *Id.* The addition of entertainment to the Fremont Street Mall's uses did not alter the fact that it remains a public thoroughfare and one of the City's two premiere gaming and commercial districts. *Id.*[1]

Fremont Street Mall is still a street as defined by the enabling legislation. City and State codes define pedestrian malls generally, and the Fremont Street Mall specifically, as streets and sidewalks. App. 23a-24a. The same major hotels, casinos and many of the same retail establishments such as McDonalds, still line the sides of Fremont Street just as they did before the renovation. Fremont Street is still located squarely in the middle of downtown, and pedestrians use it for the same purposes as they did previously. The Fremont Street Mall remains open to the elements despite the

[1] Respondents have provided this Court with photographs reproduced from the record below. *See* Respondents' Appendix A.

canopy and light-show. App. 23-24a. Both before and after its transformation, Fremont Street remains a commercial district and public thoroughfare. The grime of Fremont Street has been scrubbed away and it has been dramatically redesigned in a way that the traditional curb and gutter sidewalks fit seamlessly into the street, but its character as a commercial street remains. *Id.*

In an ill-conceived plan to protect the investment-backed expectations of the street mall's principal beneficiaries (the hotel casinos) from the competition of the type of First Amendment activity that was historically freely permitted on Fremont Street, the City enacted a number of ordinances broadly prohibiting those activities on Fremont Street. App. 7a, 142-144a.[2] The interests and expectations of the Fremont Street hotel casinos, however, are indistinguishable from the interests and expectations of other major casino hotels and industries in Las Vegas that have made capital expenditures. Similarly, the City's interest in the project is the same as the interest shared by all municipalities that expend public funds or provide tax

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[2] Section 10.44 of the Las Vegas Municipal Code (LVMC) prohibits any form of solicitation in the Fremont Street Experience, and sections 11.68.100(I), (B), and (H) respectively prohibit leafleting, unauthorized vending and the placement of displays and tables. There are no specific prohibitions against picketing and demonstrations, although these may be restricted by general prohibitions against obstructive conduct. LVMC § 10.47.010. App. 8a. Inexplicably, LVMC § 11.68.100, which contains the restrictions on handbilling, street sales, and the placement of tables or displays on Fremont Street, carves out an exception for First Amendment activities by labor organizations and, of course, for speech sponsored or approved by FSELLC officials. App. 142a-144a. Additionally, plaintiffs-respondents have alleged from the start that, despite the ban on solicitation contained in LVMC § 10.44, casino advertisements targeting gamblers and soliciting business are constantly being forced upon the very same people whom the petitioners allegedly hope to protect from this type of activity. The full text of the challenged ordinances can be found at App. 142a-144a and 148a-150a.

incentives to attract or keep businesses in the city. The City itself is not a partner in the venture in the sense that it has a direct financial stake in the success of the project. The City has not taken a mortgage or note from the FSELLC, and it receives no rents or profits. The FSELLC is solely responsible for the operation and maintenance of the mall. The responsibility for the Fremont Street project has been contractually delegated to the FSELLC, which has principal control over all commercial uses and aspects of the property, including security. App. 74a. FSELLC is solely responsible for paying the mall's operation and maintenance expenses of approximately $6 million to $10 million annually. *Id.* The petitioners' attempt to characterize their financial interest in the success of this venture as unique must be understood in this context.

The American Civil Liberties Union of Nevada and others challenged the restrictions on First Amendment activities.[3] The petitioners moved for summary judgment, which was granted in part and denied in part. App. 111a-115a. The district court found that the City had created a nonpublic forum because its principal purpose was to stimulate economic growth rather than expression, and because the textured pavement and canopy distinguished the mall from surrounding streets and sidewalks. App. 86a-96a. Applying the lesser First Amendment standard governing non-public fora, the lower court granted summary judgment to the City on the solicitation and tabling/display bans. App. 113a-114a (district court analysis); *see also* App. 58a-62a, 65a (discussing *inter alia Int'l Soc'y for Krishna*

[3] In addition to the challenged ordinances, the complaint alleged that FSELLC had "adopted policies prohibiting traditional First Amendment activity on the Fremont Street Experience, such as proselytizing, charitable soliciting, distributing literature, circulating petitions and collecting signatures, picketing, and giving away or selling message-bearing merchandise," and sought an injunction and a declaration that the restrictions were unconstitutional both facially and as applied. App. 8a.

Consciousness, Inc. v. Lee, 505 U.S. 672 (1992)). The petitioners' motion was denied as to the remaining claims. App. 113a-115a. In a later opinion, the district court granted summary judgment to the plaintiffs on the leafleting and vending bans, finding the ordinances unconstitutional even under the more lenient resonableness-viewpoint neutrality scrutiny applied to speech restrictions in nonpublic fora. App. 55a-58a, 62a-65a. As an alternative ground for invalidating the leafleting ordinance, the district court held that it violated the Equal Protection Clause because of the exemption for labor organizations. App. 53a-55a. *See Carey v. Brown,* 447 U.S. 455 (1980).[4]

Affirming in part and reversing in part, the Ninth Circuit reversed the district court's determination that Fremont Street's status as a public forum no longer existed. The court noted at the outset that "as society becomes more insular in character, it becomes essential to protect public spaces where traditional modes of speech and forms of expression can take place." App. 11a. The court, of course, was quoting from Justice Kennedy's opinion in *United States v. Kokinda,* 497 U.S. 720, 737 (1990) (Kennedy, J., concurring in the judgment). The court observed that this is "particularly true with respect to downtown public spaces conducive to expressive activities." App. 11a-12a. The court also addressed the growing phenomenon of the commercialization of public spaces and governmental attempts to control speech in newly created entertainment, tourist, and commercial venues located in the downtowns of many major American cities. It cited case from its own and other court of appeals, including *Chicago ACORN v. Metro. Pier and Exposition Auth.,* 150 F.3d 695 (7th Cir. 1998), and *First Unitarian Church of Salt Lake City v. Salt Lake City Corp.,* 308 F.3d 1114 (10th Cir. 2002).

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[4] In its original order, the district court entered a preliminary injunction on plaintiffs' leafleting and vending claims. App. 99a-101a, 106a-108a. In its second order, the injunction was made permanent. App. 53a-67a.

Applying this Court's forum analysis to the challenged restrictions, *see Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 45-46 (1983); *Ark. Educ. Television Comm'n v. Forbes,* 523 U.S. 666 (1998), the court below had little difficulty concluding that, based on its "objective attributes," Fremont Street was the quintessential public forum. The court began its analysis by explaining that streets, sidewalks and parks generally "are considered, without more, to be public forums." *See Hague v. CIO,* 307 U.S. 496 (1939); *United States v. Grace*, 461 U.S. 171 (1983) and *Frisby v. Schultz,* 487 U.S. 474, 481 (1988). Citing the objective factors present in traditional public forum cases, the court considered the three factors that it considered determinative; (i) the actual use and purposes of the property, (ii) the area's physical characteristics, and (iii) the traditional or historic use of the property in question and similar properties. App. 18a-19a (citations omitted).

After carefully reviewing each of these criteria, the court determined that Fremont Street qualifies as a traditional public forum because, despite its expensive makeover and the addition of entertainment, it "remains a public thoroughfare." App. 22a. The court noted that the street mall is open at all times for pedestrians, and cars cross over at two points. *Id.* As to the issue of physical characteristics, the street mall remains a commercial street even though its physical appearance has changed. The city and state codes define pedestrian malls generally as streets, and in fact Fremont Street remains an integral part of the city's transportation grid. The mall's "openness to the public and smooth integration into downtown preserve its public forum status." App. 23a-24a. Finally, the court held that the third criterion was satisfied due to Fremont Street's historic use, and cited other cases where courts have treated pedestrian malls or similar venues as traditional public forums. App. 24a-25a.

Rejecting the district court's reliance on the City's intent to stimulate commercial activity rather than expression, the court reiterated that "traditional public fora are open for expressive activity regardless of the government's intent." App. 26a (quoting *Forbes*, 523 U.S. at 678). The court also held that, although it is possible for a public forum to lose its status, "the destruction of public forum status . . . is at least presumptively impermissible." App. 28a (citing *Grace*, 461 U.S. at 180). The court concluded that the forum has not been closed in this case, as the actual use of Fremont Street, both before and after its transformation, is as a commercial district and public thoroughfare. App. 29a. Finally, the court rejected the petitioners' argument that the forum's "primary function and purpose" as a commercial venue is determinative of its status. The court focused instead on the actual purpose. Citing its cases involving the Las Vegas Strip and cases from other circuits involving downtown tourist and shopping districts, the court held that the "use and purpose" of Fremont Street remains as a public thoroughfare and that its "use and purpose" was not altered either by closing it to traffic or by the addition of entertainment. App. 22a. The court ultimately determined that although the "grime of Fremont Street has been scrubbed away and it has been dramatically redesigned, . . . its character as a commercial street remains unchanged." App. 29a.

Turning to the restrictions on speech, the Ninth Circuit held that the district court properly granted the injunction prohibiting the distribution of literature – even under the lesser standard of reasonableness governing nonpublic fora. App. 5a. The court held that the complete ban on leafleting was "properly granted under any standard," and clearly "cannot survive the more rigorous standard appropriate for a public forum." App. 30a-31a. The court also upheld the district court with respect to the section of the ordinance that prohibited unauthorized vending on the

street. The court first observed that the sale of merchandise that carries or constitutes a political, religious, philosophical or ideological message is protected under its precedents. Adopting the analysis of the district court, the court held that the ban on vending not authorized by government officials is invalid -- even under the reasonableness standard applicable to nonpublic forum restrictions -- because it leaves "unbridled discretion to regulate speech" with those officials. App. 32a-33a.[5]

Finally, court vacated and remanded the solicitation and tabling/display bans for the district court to assess whether the City could show that these restrictions are narrowly tailored to serve a significant government interest without burdening substantially more speech than necessary to do so. App. 33a-36a. Before the mandate could issue, the petitioners sought and were granted a stay, which respondents did not oppose.

REASONS FOR DENYING THE WRIT

This case involves a still evolving dispute about the scope of authority of the City of Las Vegas to establish a "no speech zone" on its main downtown street located in the heart of the City's major gaming and commercial district. Following the lead of cities elsewhere hoping to restore their declining downtown commercial base, Las Vegas closed historic Fremont Street for five blocks to all vehicles and reconstituted it as a pedestrian mall. As courts have noted, this method of urban revitalization is increasingly common. What is unusual about this case, however, is the City's attempt to stifle speech in order to protect the investment-backed expectations of the downtown business association, comprised principally of the major hotel casinos that have

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[5] In view of its holding on First Amendment grounds, the court did not consider the district court determination that the ordinances also violate the Equal Protection Clause by exempting certain labor-related activities. App. 29a, n.14.

been in Las Vegas for decades. Fremont Street has always been a storied and premiere gaming venue that until now was indisputably a public forum. Without citing any authority from this Court or the courts of appeals, the petitioners maintain that a pedestrian mall that is constructed over the City's old streets and sidewalks is exempt from First Amendment constraints. They assert that First Amendment activity is incompatible with the primary purpose of the street mall and that it is somehow bad for business. The petitioners are assuredly wrong. Public highways and streets are the quintessential public forum. Holding that an outdoor pedestrian mall in the heart of downtown cannot be a First Amendment forum would lead to the untenable conclusion that many public streets, sidewalks, parks, and plazas, which anchor tourist and commercial districts, are not traditional public fora, a holding that is contrary to decades of this Court's jurisprudence.

Despite the absence of authority supporting its position, the petitioners advance four reasons for granting certiorari in this case. First, the petitioners claim there is a general conflict with the decisions of this Court and the decisions of the Eleventh and Seventh Circuits over the proper application of public forum analysis. The alleged conflict, however, is less about the applicable legal standard then the outcome reached by the Court based on different facts. The petitioners also claims there is a narrower conflict with the Second Circuit over the significance of the forum's objective attributes and primary use as a factor in the forum analysis. This alleged conflict does not in fact exist, however, because the Second Circuit opinion specifically distinguished cases like this one involving downtown streets and sidewalks. Third, the petitioners ask this Court to grant a writ of certiorari because of the significant and practical problems created by the Ninth Circuit's decision about how best to use publicly owned property for commercial and entertainment purposes. They greatly exaggerate the

significance of these problems. Moreover, those concerns cannot provide the justification for jettisoning the First Amendment principles that have always protected the rights of citizens to use the municipal streets and sidewalks for purposes of assembly and expression. Finally, the petitioners assert that the Court should grant the writ to check the Ninth Circuit's purported "expansion" of public forum doctrine. Contrary to the petitioners' argument, however, the decision below breaks no new ground. It is the petitioners who are making a constitutional mountain out of what, in effect, is a factual molehill. They are asking this Court to undertake the impossible task of addressing the myriad factual circumstances under which a government may validly close a public forum, even though that is not what has occurred here. We respectfully submit that none of the petitioners' claimed reasons for review have merit, and that the petition should be denied for the reasons set forth below.

1. Contrary to the petitioners' contention, there is no conflict with this Court's forum analysis. The Ninth Circuit decision applies traditional forum analysis and is faithful to this Court's precedents. The cases cited by the petitioners, *Greer v. Spock*, 424 U.S. 828 (1976), and *ISKCON v. Lee, supra,* support the Ninth Circuit's analysis and, moreover, are easily distinguishable on their facts. This case does not involve a military base or an airport. Rather, it involves Las Vegas's premiere and busiest street in the heart of downtown. The other cases cited by the petitioners are also easily distinguishable on their facts and do not suggest a conflict over the applicable legal standard. *See Chicago ACORN*, 150 F.3d at 702 (commercial complex constructed on former Navy Pier was not a traditional public forum); *Sentinel Communications Co. v. Watts,* 936 F.2d 1189, 1203-04 (11th Cir. 1991) (sidewalks leading to the restrooms at interstate rest areas, are not traditional public fora). Applying the same legal principles in *Chicago ACORN*,

Judge Posner, writing for the Seventh Circuit, made a point of distinguishing cases like this one, which involves a former street now closed to traffic but that continues to anchor the downtown commercial districts. The court, of course, was referring to Chicago's famous "State Street." 150 F.3d at 702-03. It is not surprising, therefore, that the Ninth Circuit cites *Chicago ACORN* throughout its opinion in support of its conclusion that Fremont Street is a public forum.

2. Similarly, there is no merit to the petitioners' contention that the decision below conflicts more pointedly with the Second Circuit's recent decision involving New York's Lincoln Center for the Performing Arts. *Hotel Employees & Rest. Employees Union Local 100 v. City of New York Dep't of Parks & Recreation,* 311 F.3d 534 (2d Cir. 2002). The case was decided on a completely different set of facts and does not raise a dispute over the applicable legal principles; instead, it demonstrates nothing more than different legal outcomes arising from the application of established legal principles. This case was decided based on the forum's objective attributes and its character and use as a central commercial street. The Second Circuit's opinion not only distinguished cases like this one involving traditional downtown streets and sidewalks, but also concluded that the plaza outside Lincoln Center performs a different function than the use and function of Fremont Street. Whether one agrees or disagrees with the factual conclusion reached by either court about the objective attributes of the forum under consideration, it is a different view of the facts rather than the law that explains the different conclusions reached by the Second Circuit and the court below.

3. Additionally, no weight should be given to the petitioners' contention that the Ninth Circuit decision creates significant practical problems for municipalities about how best to use publicly owned property for commercial and entertainment purposes. When Fremont Street was closed to vehicles, the petitioners voluntarily

dedicated Fremont Street to public use and agreed to keep the street open and accessible for pedestrian use at all times. Petitioners overstate the importance of the issues at stake here. In traditional public fora, the City's desire to protect its residents and visitors from the distractions of peaceful and unobtrusive First Amendment activity has never been a consideration in this Court's public forum cases. In fact, this Court's cases have long held that streets and sidewalks are the natural locus for First Amendment activity. Similarly, it is irrelevant that the City's private partners in this project believe that First Amendment activity will somehow impede their commercial objectives and defeat their investment-backed expectations. These are the very same casinos and businesses that have always anchored Fremont Street and they are no more entitled to a "free speech zone" then they were before the street and curb and gutter sidewalks were reconfigured to fit seamlessly into each other. Their interests are no different than the interests of other businesses located in other parts of Las Vegas and cities elsewhere. What the petitioners seek is a competitive advantage over other businesses and casinos anchoring the Las Vegas Strip, where similar attempts to restrict First Amendment activity have been struck down. *See Venetian Casino Resort, L.L.C. v. Local Joint Executive Bd.*, 257 F.3d 937 (9th Cir. 2001), and *S.O.C., Inc. v. County of Clark*, 152 F.3d 1136 (9th Cir. 1998). Similarly, the City's interest in ensuring the success of this project is indistinguishable from its interests in other projects using public funds to attract and keep businesses. That interest has never been thought sufficient to restrict speech on traditional public fora. *See Chicago ACORN*, 150 F.3d at 702-03 (distinguishing City's interests in tax revenues from the City's interest as a proprietor).

4. Finally, the Ninth Circuit decision does not represent an expansion of public forum doctrine beyond its historic confines. Notwithstanding the petitioners' arguments to the contrary, this case does not present

circumstances where the City has voluntarily closed a public forum or changed its character as a central commercial street. Moreover, there is no overarching reason for this Court to grant a writ of certiorari in order to address the multitude of circumstances under which the government might properly close a public forum. The petitioners do not even claim there is a conflict in the circuits on this issue because none exists, as these cases are necessarily fact specific. Although interesting First Amendment issues might arise in a case where the government withdrew a public forum and created a special events venue that purported to limit the public's access or remove it from the City's transportation grid, this case does not remotely present those facts or those issues. This case does not involve a City's effort to bring a sports complex or private mall downtown that is constructed over what used to be public streets and sidewalks. To the contrary, the Fremont Street is still a street and it remains a vital downtown artery for pedestrian traffic.

I. PRUDENTIAL REASONS FOR NOT GRANTING A WRIT OF CERTIORARI

Before turning to the petitioners' asserted grounds for granting a writ of certiorari, we submit that there are sound prudential reasons for the Court to stay out of this dispute at this juncture. First, the court of appeals held that the municipal ordinances restricting leafleting and the sale of message-bearing materials fails even under the lesser First Amendment standard governing non-public fora applied by the district court. App. 5a. *See ISKCON, supra.* That holding is unlikely to change no matter how this case is decided. Given the record in this case, the petitioners are unlikely to benefit from a decision on the public forum issue – regardless of outcome. In fact, they have not even raised this issue in their petition. [6]

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[6] Additionally, the district court also held that the leafleting ban violated the Equal Protection Clause because it carved out an exception for labor

The other claims raised by respondents present a different problem that makes this case inappropriate for review at this time. The Ninth Circuit did not rule on respondents' claims challenging the restrictions on solicitation and informational tabling. Those claims were remanded for additional findings that may or may not result in a ruling enjoining the challenged restrictions. Under these circumstances, the petition is premature. Hence, there is no urgency or compelling reason for this Court to assert itself into the dispute at this juncture. The petitioners will have ample opportunity to pursue further appeals in the event of an adverse order granting plaintiffs-respondents additional relief on their remaining claims.

II. THE NINTH CIRCUIT DECISION DOES NOT CONFLICT WITH THIS COURT'S FORUM ANALYSIS OR THE USE OF THAT ANALYSIS BY THE LOWER COURTS

As the Supreme Court has explained, streets, sidewalks, and parks "traditionally have been held open to the public for expressive activities and are clearly within those areas of public property that may be considered, generally without further inquiry, to be public forum property." *Grace,* 461 U.S. at 179. Indeed, the Court has decreed that sidewalks are the "archetype of a traditional public forum." *Frisby,* 487 U.S. at 480. That is because from "'time out of mind' public streets and sidewalks have been used for assembly and debate, the hallmarks of a traditional public forum." *Id.* (quoting *Hague*, 307 U.S. at 515). As this Court recently underscored, "traditional public fora are open for expressive activity regardless of the government's intent. The objective characteristics of these

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organizations. App. 53a-55a. The court of appeals found it unnecessary to reach the issue in view of its holding that the injunction was properly granted under the First Amendment. App. 29a, n.14. Here again the petitioners have not preserved this issue.

properties require the government to accommodate private speakers." *Forbes,* 523 U.S. at 677-78.

In this case, there is no dispute that for decades prior to its restoration, Fremont Street was the quintessential public forum. It has always been the busiest downtown street in Las Vegas and anchors the City's thriving and historic gaming district. Without citing any direct authority, the petitioners broadly assert that the "modern" Fremont Street is no longer a public forum because it has been dramatically redesigned and its use as a street has changed. The Ninth Circuit rejected these premises and determined that Fremont Street's actual use and purpose as a commercial street have not changed. Based on objective criteria present in this Court's public forum cases, and cases cited by other courts of appeals, the Ninth Circuit rejected the petitioners' argument that Fremont Street's status as a public forum had changed. The court specifically determined that the actual use of Fremont Street, both before and after its transformation, remains as before. The court observed, "[t]he grime of Fremont Street has been scrubbed away and it has been dramatically designed, but its character as a commercial street remains." App. 29a.

The petitioners attempt to draw this Court into a conflict by arguing that the government, like a private property owner, has the power to preserve the property under its control for the use to which it is lawfully dedicated. *See Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.,* 473 U.S. 788, 800 (1985). Similarly, the petitioners assert that the Court has long rejected the argument that any time publicly-owned property is opened to the public, it thereby serves as a public forum for speech. *See Greer*, 424 U.S. at 836. Respondents have no quarrel with these general observations. Nor do respondents dispute that "modern" venues, like airport terminals and highway rest stops do not qualify as traditional public fora, even though they are

generally open to the public. *ISKCON*, 505 U.S. at 680; *Sentinel Communications,* 936 F.3d. at 1203.

Fremont Street, however, is first and foremost a street and, therefore, presumptively a public forum. *See Grace,* 461 U.S. at 179. Although it is possible to change the status of a public forum by closing it or by altering the "objective physical character or uses of the property," *ISKCON,* 505 U.S. at 700 (Kennedy, J., concurring), the actual use of Fremont Street as a commercial street remains unchanged. App. 29a. This is true despite the expensive makeover and the addition of regularly scheduled promotional events. The Ninth Circuit broke new ground in this case and instead, followed this Court's lead by observing that the government "may not by its own *ipse dixit* destroy the public forum status of streets and parks which have historically been public forums." App. 28a (quoting *Grace,* 461 U.S. at 180). Instead, the court properly focused on the objective attributes of the property rather than the intent of the parties to change the status of the forum. *See Forbes,* 523 U.S. at 678.

Finally, by directing this Court to *Chicago ACORN*, the petitioners show how critically they misperceive public forum doctrine. That case involved a challenge to restrictions on First Amendment activity on Chicago's Navy Pier. Judge Posner, writing for the Court described the area as follows:

> Navy Pier, in downtown Chicago, juts out 3,000 feet into Lake Michigan and is more than 400 feet wide at its widest point. Formerly a naval facility, by the 1980s it was little used and in 1989 the Illinois legislature handed it over to the MPEA (at the time known as the Metropolitan Fair and Exposition Authority) and appropriated $200 million for the pier's renovation. The pier was to be transformed into a recreational and

> commercial center – part park, part meeting and exhibition facility, part shopping emporium, part amusement park.

150 F.3d at 698.

One issue confronted by the Seventh Circuit was whether the walkways and the plaza on the pier should be classified as a public forum. In stating that such areas did not meet the criteria for public forum status, Judge Posner noted:

> The sidewalks are not through routes; they lead only to the pier facilities themselves. . . . Rather than being part of the city's automotive, pedestrian, or bicyclists' transportation grid, the sidewalks on the pier and the service street on its north side are internal to the pier, like the sidewalks, streets, and parking lots in Disney World or McCormick Place (Chicago's major convention center, also owned by the MPEA). *Cf. United States v. Kokinda*, 497 U.S. 720, 727 (1990) (plurality opinion). The pier itself is a discrete, outlying segment or projection of Chicago rather than a right of way. It is its own little world of delights and in this respect it is something like a major airport, which the Supreme Court in *ISKCON*, 505 U.S. at 672, refused to classify as a public forum.

Id. at 702.

The criteria the Seventh Circuit used to determine that Navy Pier was not a public forum point to the opposite conclusion when applied to the instant case. For this reason, it is not surprising that the Ninth Circuit cited Judge Posner's opinion throughout in support of its determination that Fremont Street, by contrast, is a public forum. App. 11a, 16a, 20a, 23a. Fremont Street and the surrounding streets

that comprise the Fremont Street Experience are a major part of the "transportation grid" of downtown Las Vegas. Although the Navy Pier is a "discrete, outlying segment or projection of Chicago rather than a right of way," the opposite is true in Las Vegas. Far from being a mere appendage to downtown, Fremont Street is its core commercial thoroughfare. Furthermore, Chicago's Navy Pier never was a public forum. The creation of the complex there did not involve an attempt to change the status of a longstanding public forum.[7] In short, the analysis in *Chicago ACORN* is entirely consistent with the result reached below.

Another important difference from the Seventh Circuit case is that *Chicago ACORN* involved a situation in which the City of Chicago owned all of the property on the Pier. The private businesses located there rented from the government. In contrast, the Fremont Street Experience is designed to aid preexisting private businesses, particularly

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[7] The Seventh Circuit also emphasized that the City of Chicago owned all of the buildings on Navy Pier in contrast to State Street in Chicago and the Fremont Street Mall in this case:

> Because the MPEA owns the buildings on Navy Pier and depends for the upkeep of the pier on the commercial revenues that those buildings generate, it has a legitimate and substantial interest in preventing activities that could kill those revenues. It has a greater interest than the City of Chicago itself has in the prosperity of the shops along State Street. Even that interest is not negligible, because the amount of tax that the City can extract from merchants and their customers depends on the merchants' revenues. But it is a lesser interest than the MPEA's corresponding interest in the commercial health of Navy Pier and therefore it does not justify equivalent restrictions on political expression. This may be why State Street is a traditional public forum and Navy Pier is not.

150 F.3d at 702-03.

the casino-hotels. According to the Seventh Circuit that distinction is important.[8]

If the petitioners have a dispute here, it is with the Ninth Circuit's determination that Fremont Street's character as a central commercial street has not changed. Whether one agrees or disagrees with that conclusion it indisputably formed the basis for the Ninth Circuit's holding. Nothing in the decision suggests any disagreement with the holdings in this Court's cases or in the *Chicago ACORN* decision. The petitioners' quarrel is with the Ninth Circuit's factual premise. Once that premise is accepted, the Ninth Circuit's public forum analysis is both unexceptional and entirely consistent with the approach taken by this Court and by numerous other courts.

If anything, this case and a dozen other cases, as well, demonstrate that the lower courts fully understand the governing legal principles and are entirely capable of applying this Court's public forum doctrine to disparate facts. *See Lederman v. United States,* 291 F.3d 36 (D.C. Cir. 2002) (sidewalks outside Capitol building are a public forum); *Venetian Casino Resort, L.L.C. v. Local Joint Exec. Bd.,* 257 F.3d 937 (9th Cir. 2001) (sidewalks in Las Vegas gaming district are a public forum); *Hawkins v. City and County of Denver,* 170 F.3d 1281, 1287-88 (10th Cir. 1999)

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[8] The Seventh Circuit addressed the extent that municipalities can go to emulate private property owners, concluding that governments do not have the same rights to control protected expression as owners of private facilities:

> [N]owhere is it written that government, when it embarks on essentially commercial ventures, is entitled to the same freedom of action as private ventures. It is not as if the ownership of shopping malls and convention centers were at the core of the American concept of government.

Id. at 701.

(finding that Galleria entryway to Denver Performing Arts Complex not public forum); *Warren v. Fairfax County*, 196 F.3d 186 (4th Cir. 1999) (park-like mall on grounds of government complex is a traditional public forum); *Chicago ACORN*, 150 F.3d at 695 (sidewalks, plaza, and amusement park located on Navy Pier are not a public forum); *Congregation Lubavitch v. City of Cincinnati,* 997 F.2d 1160, 1161 (6th Cir. 1993) (downtown plaza is a public forum); *Henderson v. Lujan*, 964 F.2d 1179, 1182 (D.C. Cir. 1992) (sidewalks surrounding Vietnam Veteran's Memorial are a public forum); *Paulsen v. County of Nassau,* 925 F.2d 65 (2d Cir. 1991) (sidewalks around sports complex are a designated public forum). Hence, not only is there no conflict among the circuits, there is no confusion in the lower courts over the governing legal standards or a need for further clarification by this Court.

III. THE DECISION PRESENTS NO DIRECT CONFLICT WITH THE SECOND CIRCUIT

In an attempt to manufacture a more specific conflict, the petitioners assert that the Second and Ninth Circuits disagree about the proper weight that should be given to the objective physical characteristics and use of the property in making a forum determination. What the petitioners fail to acknowledge is that in making the forum determination, both courts were informed by the same factors, including the "location, use, and purpose of the property in question." *Hotel Employees,* 311 F.3d at 546. In a case involving Lincoln Center for the Performing Arts, the Second Circuit stated that the property's "primary function and purpose" is an important consideration in cases that do not easily meet the historic definition of a traditional public forum. *Id.* at 550. Any purported conflict only arises from this statement, and not from the Second Circuit's holding. The court concluded that the primary use of the plaza outside the performing arts center was specifically related to the use of Lincoln Center as a performing arts complex and was not

created primarily to operate as a public artery. *Id.* at 552. The court specifically distinguished cases like this one involving downtown streets and sidewalks that serve their traditional purposes. *Id.* at 550 (noting that Lincoln Center Plaza "does not form part of the city's transportation grid in the way that traditional streets and sidewalks do.").

As the petitioners correctly point out, the Ninth Circuit went to some length to explain its view that placing too much emphasis on the property's "primary function and purpose" might in some cases lead to the result that properties which otherwise have the objective attributes of a public forum (and are fully compatible with expressive activity) could be removed or excluded from public forum status. App. 20a-22a. In explaining its concern on this point, the court stated that it has frequently been observed that the "notion that traditional public forums are properties that have public discourse as their principal purpose is a most doubtful fiction." *Id.* (quoting *ISKCON,* 505 U.S. at 696 (Kennedy, J., concurring)); *see also Warren*, 196 F.3d at 195 ("The primary purpose for which a particular piece of property was created is not dispositive. One cannot seriously argue with Justice Kennedy's observation that the traditional public fora of streets, sidewalks, and parks are not primarily designed for expressive purposes.").

The important point for purposes of the asserted conflict is that whatever tension exists in the approaches taken by the two courts – if any – is both minor and theoretical. The Ninth Circuit decision in fact focused on the actual use and purpose of the property as a pedestrian thoroughfare. App. 20a. Indeed, the petitioners conceded that the use of the property as a public thoroughfare is frequently dispositive and, therefore, such property meets "the classic definition of a public forum." App. 20a. In the final analysis, the distinction urged by the petitioners is no distinction at all with respect to the holdings in the two cases. Nothing in those cases remotely bring the circuits into

conflict over the holdings in the Fremont Street and Lincoln Center cases.

Applying this Court's well-established public forum law, the Second Circuit held in *Hotel Employees* that the plaza in front of Lincoln Center is not a public forum because it was not designed to serve as a public thoroughfare. 311 F.3d at 550-52. Applying the same legal principles, the Ninth Circuit similarly held that Fremont Street is a public forum because its primary use and function as a public thoroughfare and character as a commercial street had not changed. It is hardly surprising, therefore, and more legally relevant, that the Second Circuit easily distinguished cases like this one when it decided the case. *Id.* (comparing *First Unitarian*, 308 F.3d at 1114). In that case, the Tenth Circuit held that a portion of "Main Street" sold to a private party and converted into a pedestrian plaza remained a traditional public forum because, by retaining an easement for public passage over the property, the city intended to encourage pedestrian traffic and to preserve and enhance the downtown pedestrian grid. 308 F.3d at 1125-27. These distinguishing attributes, of course, perfectly define this case. Hence, what the petitioners describe as a conflict is simply a reflection of the fact that the same principle applied to different factual circumstances will often lead to different results. The petitioners must show more than that to justify a grant of certiorari.

Unlike Lincoln Center, the property in dispute here involves streets and sidewalks that were undisputedly a public forum prior to their transformation into a pedestrian mall. The enabling legislation and the agreement with the FSELLC both require that the street mall allow unobstructed pedestrian access. Fremont Street remains downtown's busiest commercial street and serves as the main axis in the city's transportation grid. By contrast, the Second Circuit concluded in *Hotel Employees* that the plaza outside Lincoln Center performs a different function. As emphasized in the

last section, whether one agrees or disagrees with that conclusion, it formed the basis for the court's holding and nothing in the decision suggests any disagreement with the Ninth Circuit's holding that streets and sidewalks that continue their historic function as a main public thoroughfare should continue to be treated as a public forum for First Amendment purposes.

In an effort to create a conflict, the petitioners emphasize their own version of the facts, but their recitation is both incomplete and misleading. There can be no doubt that the Lincoln Center case turned on a number of limiting factors conspicuously absent from any mention in the petitioners' brief, including most importantly the fact that the plaza forecourt "does not form part of the City's transportation grid in the way that traditional streets and sidewalks do." 311 F.3d at 550. The Second Circuit also observed that the ability of pedestrians to cross the plaza as a "shortcut between surrounding streets is merely an incidental feature of its principal function as the entrance plaza for the Lincoln Center complex." *Id.* As the Second Circuit itself pointed out, these facts were critical to its decision and, in its view, clearly distinguished Lincoln Center from the *First Unitarian Church* decision decided on almost identical facts as this one. *Id.; compare Hawkins*, 170 F.3d at 1287 (10th Cir. 1999) ("The Galleria does not form part of Denver's automotive, bicycle or pedestrian transportation grid, for it is closed to vehicles and pedestrians generally do not use it as a throughway to another destination. Rather, the Galleria's function is simply to permit ingress to and egress from the DPAC's various complexes").[9]

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[9] An examination of the factors relied upon by the Second Circuit actually belies petitioners' argument that there is a conflict between the circuits. Discussing Lincoln Center Plaza's location, function and purpose, the Second Circuit specifically distinguished the plaza from the sidewalks under consideration in this case:

The distinguishing factors present in this case cited by the Second Circuit panel are not casual or accidental invocations. They go to the very heart of the public forum analysis. The actual purpose and use of the mall in this case is a pedestrian thoroughfare. This is not merely the use the City has in practice permitted, but is in fact the expressed purpose for which the mall was created. The City's stated objectives for promoting and approving the overall project were to increase usable public open space in the downtown area, encourage pedestrian traffic generally, stimulate business activity, and provide a venue closed to automobile traffic. While the City wanted to close the street to automobile traffic, it simultaneously wanted to preserve and indeed encourage pedestrian traffic. Unlike the forecourt at Lincoln Center, the mall was neither established nor functions solely for ingress and egress to the abutting properties. The petitioners' attempt to draw a parallel to the description of how the forecourt at Lincoln Center functions is at odds with the findings in this case. Fremont Street does more than provide access to those with casino business.

In view of the obvious factual differences between how Lincoln Center and Fremont Street function, the petitioners' argument that there is a conflict is incorrect. Their contention is further undermined by the fact that the

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> Thus, it is apparent that the Plaza's primary function and purpose is to serve as a pleasing forecourt at the center of a prominent performing arts complex, to facilitate patrons' passage into the events taking place in the arts buildings, and symbolically to promote the cultural arts for the benefit of the community. Although the Plaza's design clearly invites passers-by to stroll through or linger, the Plaza was not created primarily to operate as a public artery, nor to provide an open forum for all forms of public expression.

311 F.3d at 551-52. Only by ignoring the critical factual differences between these two cases can Petitioners argue that there is actually a conflict between the Second and Ninth Circuits.

Second Circuit specifically discussed and distinguished cases involving downtown streets and sidewalks, thus rejecting the claimed conflict on which the petitioners now rely.

IV. THE NINTH CIRCUIT DECISION DOES NOT UNDULY INTERFERE WITH GOVERNMENTAL DISCRETION ABOUT HOW TO MANAGE ITS PROPERTY

According to the petitioners, the Ninth Circuit's decision unduly interferes with governmental discretion over how to best use publicly owned property and impedes their redevelopment efforts. Following the lead of the Tenth Circuit, the court below rejected that argument with the observation that

> "as society becomes more insular in character, it becomes essential to protect public places where traditional modes of speech and forms of expression can take place." *United States v. Kokinda,* 497 U.S. 720, 737 (1990) (Kennedy, J., concurring in the judgment). We think this is particularly true with respect to downtown public spaces conducive to expressive activities.

App. 11a-12a (quoting *First Unitarian,* 308 F.3d at 1131). The petitioners take exception to the lower court's sensitivity to this issue and its conclusion that "[a]wareness of contemporary threats to speech must inform our jurisprudence regarding public forums." App. 12a. In effect, the petitioners are seeking a First Amendment exemption for today's "modern downtowns."

Moreover, a careful reading of the petitioners' brief reveals that they are asking this Court to decide the circumstances under which a public forum can be closed. But this case does not present an appropriate record to resolve that issue. Here, Fremont Street not only remains a

pedestrian street as defined by the enabling legislation and the agreement between the City and the FSELLC, but there is also a factual finding that the pedestrian mall in practice continues to fulfill its intended and historic function as a public thoroughfare. Even the petitioners have never claimed that this factual finding is clearly erroneous. The Court might someday want to consider a case in which the streets and sidewalks have been closed and the use of the venue changed to a different use, but that issue is not presented by these facts.

The petitioners' view is that the government always retains the authority to close a public forum by, among other things, selling the property. *See ISKCON,* 505 U.S. at 699-700. We have no quarrel with this general observation, but clearly it must be understood in the context of the overriding principle that the government cannot overcome that presumption by mere fiat: the government "must alter the objective physical character or physical uses of the property, and bear the attendant costs." *Id.* at 700. Neither the fact that the City has entered into an operating agreement with the FSELLC nor the fact that the sidewalks no longer look like traditional curb and gutter sidewalks negates the public forum status of municipal sidewalks under circumstances where, as here, they continue to have the essential form and function of municipal sidewalks by design and by statute.

Although the addition of the canopy covering a portion of the street mall distinguishes the Fremont Street Mall from other pedestrian malls elsewhere, there has been no fundamental alteration in the objective physical characteristics or uses of the property as a busy commercial street located in the heart the downtown gaming district. It is also true that the sidewalks on Fremont Street do not resemble traditional curb and gutter sidewalks. Nevertheless, Fremont Street remains open to the elements, is integrated with the other streets that cross and surround it, and continues to serve as a pedestrian throughway for

downtown commuters, shoppers, and visitors. The Fremont Street Mall functions like pedestrian malls in other cities. Any difference in physical design is essentially a question of degree. In addition to the hotel-casinos and other businesses that have historically anchored Fremont Street, city officials have taken steps to ensure the comfort of visitors by adding attractions typically found in city parks such as benches, eating areas, and pushcart food and souvenir vendors. To the extent the sidewalks provide access to the hotel casinos, the former streets and sidewalks did the same. Similarly, to the extent that the new Fremont Street is designed to appeal to tourists and fill those casinos, the old historic Fremont Street (also known as "glitter gulch") performed the same function.

There is no compelling reason for the Court to grant certiorari in order to resolve the circumstances under which a city may change the forum status of its downtown streets and sidewalks. Respondents do not understand the lower courts to have struggled with this issue and see no evidence of a conflict in the courts of appeals. Nor have the petitioners cited any cases to suggest that such a conflict exists. More importantly, this case does not clearly present that issue, as the petitioners are statutorily required to keep the mall open for unobstructed pedestrian use.

V. THE NINTH CIRCUIT DECISION DOES NOT REPRESENT AN EXPANSION OF PUBLIC FORUM DOCTRINE

The petitioners greatly exaggerate the legal significance of the issues in this case and attempt to draw the Court into an abstract dispute about the "expansion" of First Amendment forum doctrine and its potential to interfere with urban redevelopment. The decision in this case poses no more a threat to the petitioners' asserted interests than other constitutional limitations that cabin their discretion. It simply ensures that municipalities do not surrender the public's First Amendment rights even for other public

benefits such as urban renewal. Every redevelopment project certainly will not involve a public forum. This case, however, involves the main downtown street of the City of Las Vegas. Therefore, whereas downtown projects involving municipal arenas, sport stadiums, or performing art centers may raise different considerations and interesting legal questions, this case involves none of those properties.

What the petitioners are really asking the Court to do is to analyze this case divorced from the fact that Fremont Street's actual use and function is still that of a street. The petitioners seek to distance themselves completely from any constitutional requirements that flow from the property's status as a street. But expressive activities have been historically compatible with, if not virtually inherent in, property dedicated as streets and sidewalks. The court below correctly rejected the petitioners' attempt to sidestep the constitutional obligations that flow from the operation of streets and sidewalks.

The petitioners cannot have it both ways. Having chosen to maintain Fremont Street's status and function as a commercial street, the City cannot now walk away from its constitutional obligations simply because the new Fremont Street has a different design than the old Fremont Street. Holding the petitioners to constitutional requirements under the circumstances present in this case is hardly controversial. The decision below does not break new ground, nor does it present the grave danger to the interests that the petitioners assert. Contrary to the petitioners' claim, the right to assemble and communicate in such places may not be abridged or denied regardless of the government's intent to change the status of the property or to protect the investment-backed expectations of its private partners.

CONCLUSION

For the reasons states above, the writ of certiorari should be denied.

Respectfully Submitted,

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Dated: December 15, 2003

APPENDIX A

Photographs From the Court Below

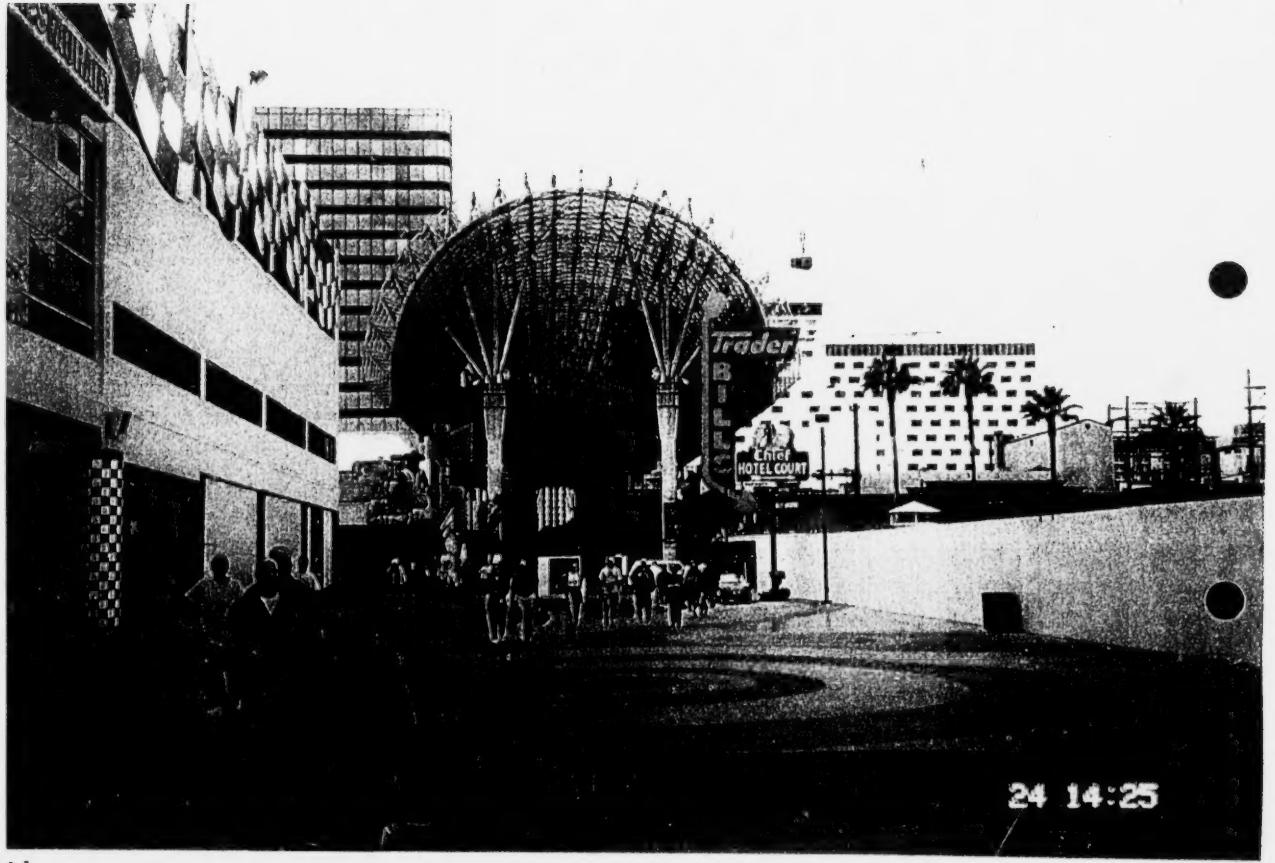



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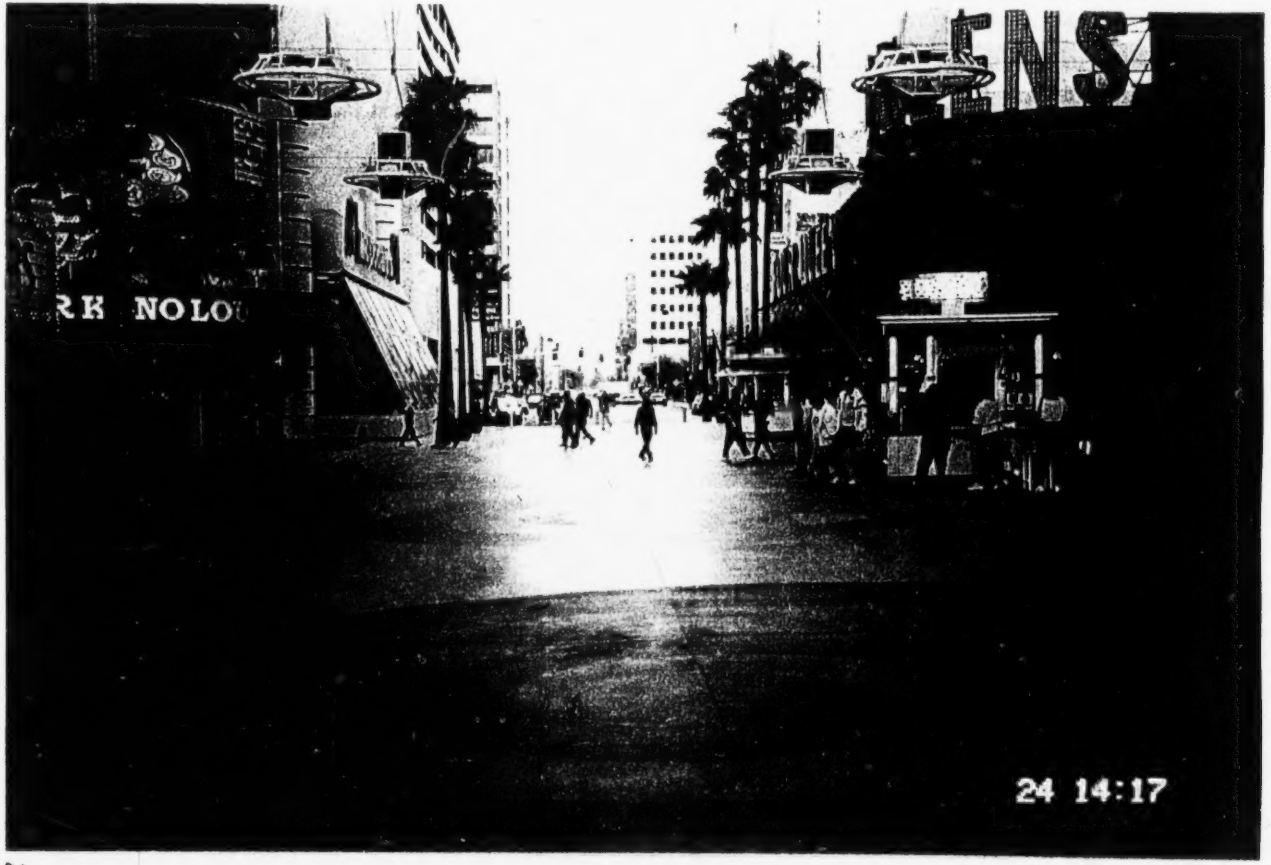

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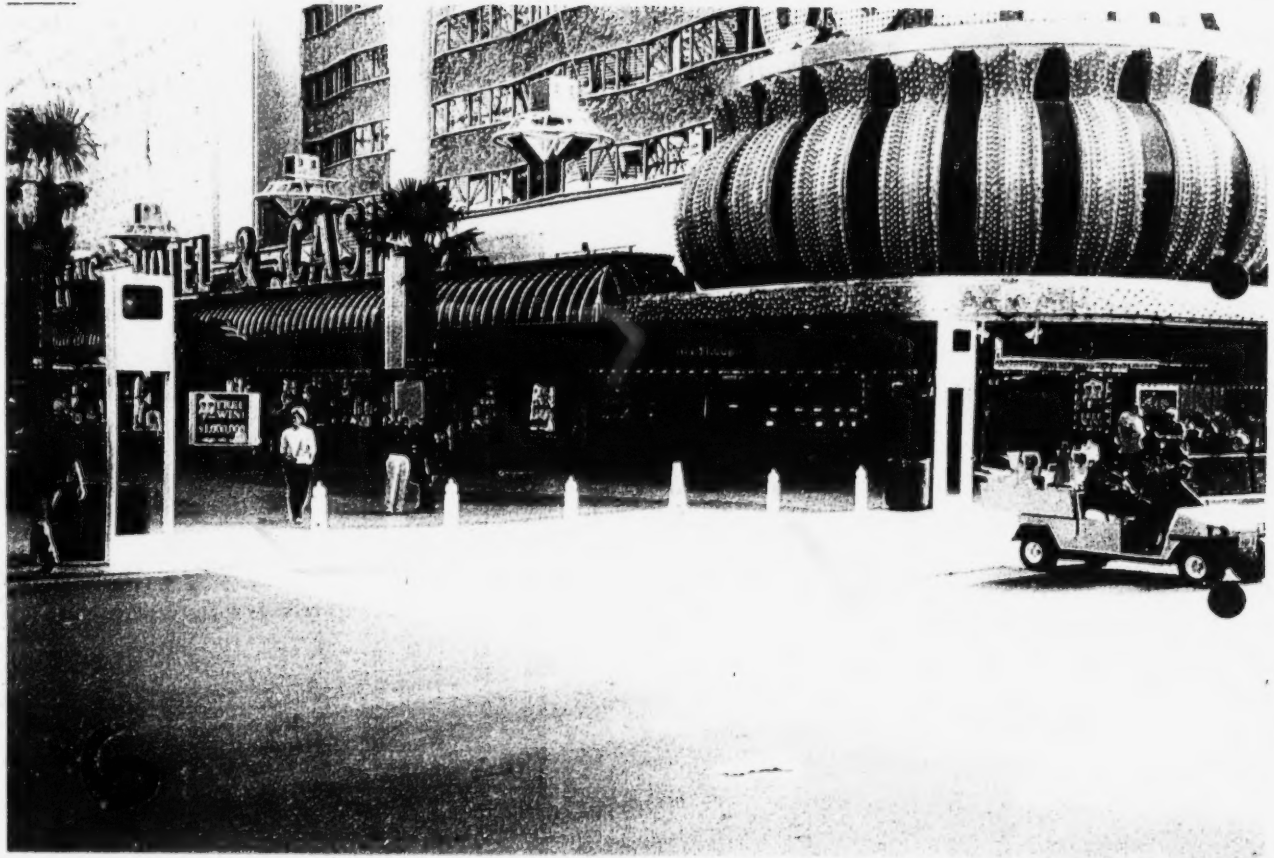

Pizza Hut
1912
TRADER BILL'S
JEWELRY
OUTPOST
HARLEY-DAVIDSON

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Plaza
HOTEL
CASINO
SUB
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Party